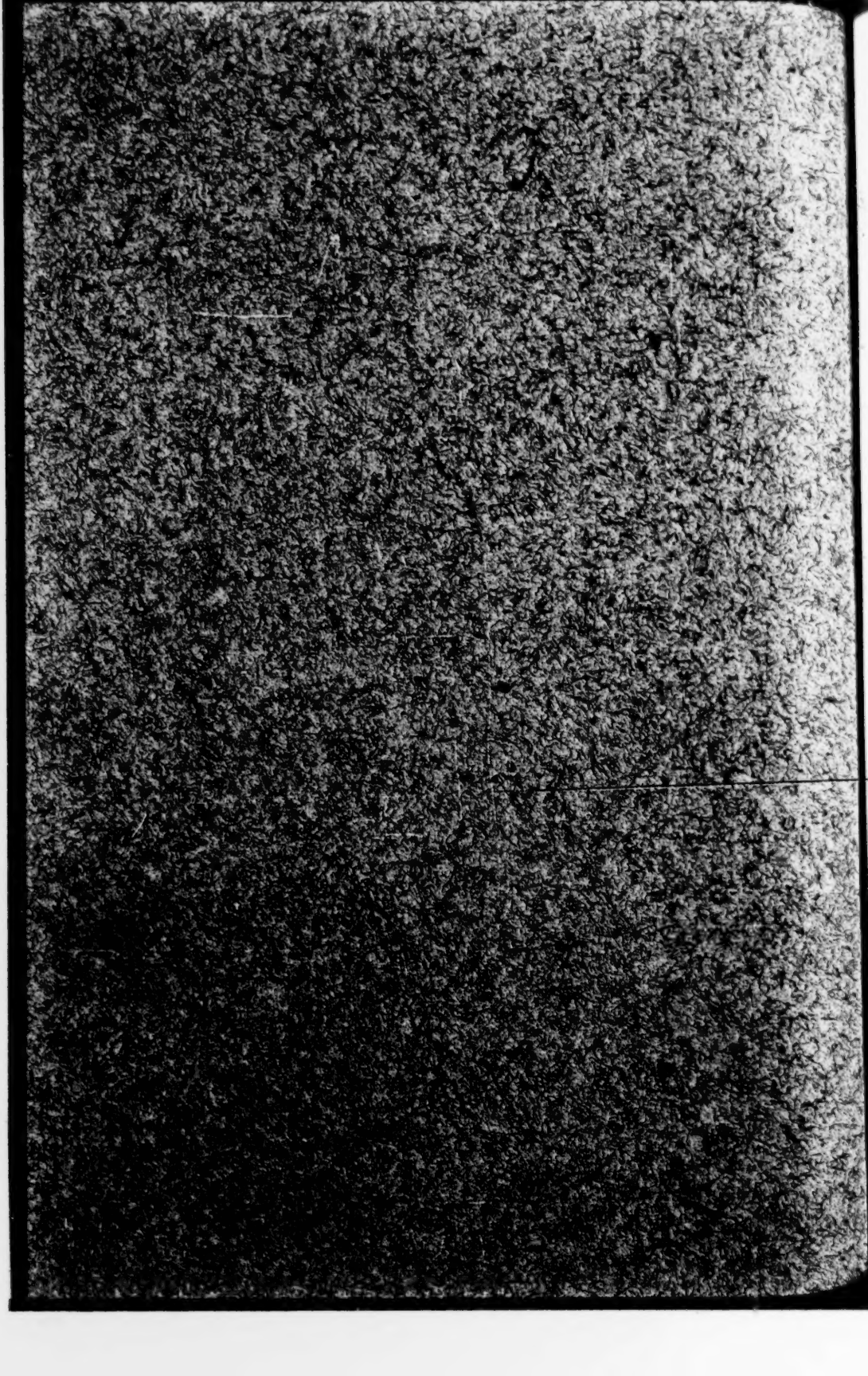

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1933.

CLAIRE A. WARNER, Administratrix of the Estate of JOHN M. WARNER, Deceased,
Petitioner (Appellant Below),
vs.
EDWARD F. GOLTRA, Doing Business Under the Style and Name of THE GOLTRA BARGE LINE.

No. [redacted] 4

On Writ of Certiorari to the Supreme Court of the State of Missouri.

PETITIONER'S BRIEF ON THE MERITS.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1933.

CLAIRE A. WARNER, Administratrix of the Estate of JOHN M. WARNER, Deceased,
Petitioner (Appellant Below),
vs.
EDWARD F. GOLTRA, Doing Business Under the Style and Name of THE GOLTRA BARGE LINE.

No. 870.

On Writ of Certiorari to the Supreme Court of the State of Missouri.

PETITIONER'S BRIEF ON THE MERITS.

I.

OPINION OF THE COURT BELOW.

The opinion of the Supreme Court of Missouri (R. 11) has not yet been officially reported, but may be found in 67 S. W. (2d) 47. The date of the opinion is December 20, 1933.

II.

JURISDICTION.

A full statement as to the jurisdiction of this Court is given on pages 8 and 9 of petitioner's petition for writ of certiorari and brief in support thereof and, in the interest of brevity, will not be here repeated.

This Court's writ of certiorari was granted April 9, 1934.

III.

STATEMENT OF THE CASE.

The sole question involved in this proceeding may be stated as follows:

> Whether the personal representative of a deceased **master** of a vessel owned by a citizen of the United States, who was killed as the result of the negligence of his employer, was granted a cause of action for damages for the death of such **master**, by Section 33 of the Merchant Marine Act of June 5, 1920 (46 U. S. C. A. 688), which provides that the personal representative of a **seaman**, who is thus killed, may maintain an action at law for damages under the statutes of the United States conferring or regulating the right of action for death in the case of railway employes?

The Supreme Court of Missouri held that as the master of a vessel was not a seaman, no such cause of action was granted by said act.

This question originates in a suit filed in the Circuit Court of the City of St. Louis, Missouri. Said action was brought by your petitioner, Claire A. Warner, who is the widow and administratrix of the estate of John M. Warner, for the purpose of recovering damages on behalf of her daughter and herself for the wrongful death of her said husband. The defendant was the respondent Edward F. Goltra, who was then doing business under the name of the Goltra Barge Line, the main office of which was located in St. Louis, Missouri. In her second amended petition (R. 2) your petitioner alleged that at the time of his death Warner was employed by Goltra as captain or master of the towboat "Iowa," was on board said vessel in the scope of his employment and course of his duties as such master, and was engaged in interstate commerce; that at said time the "Iowa" was being navigated and used by other agents and employes of Goltra to unground certain barges of freight which it had previously been pushing down the Ohio River in interstate commerce, and which had become stuck upon a sand bar in said river; that in attempting to unground said barges the "Iowa" was so negligently and unskillfully navigated and managed by said other agents and employes of Goltra that they caused it to collide violently with the grounded barges and the bank of said river, and that the shock or jar caused by said collision threw Captain Warner into the Ohio River where he was drowned.

In bringing said suit your petitioner believed that she

was proceeding in accordance with rights and privileges granted to her by Section 33 of the Merchant Marine Act of June 5, 1920 (S. 688, C. 18, Title 46, U. S. C. A.; C. 250, S. 33, 41 Stat. 1007), which reads as follows:

> "Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employes shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employes shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located."

Respondent filed a general demurrer to said petition (R. 7). In support thereof he contended that under Sec. 713, C. 18, Title 46, U. S. C. A. (Act of June 7, 1872, C. 322, S. 65, 17 Stat. 277; R. S., Sec. 4612; December 21, 1898, C. 28, S. 23, 30 Stat. 762; March 4, 1915, C. 153, S. 10, 38 Stat. 1168), Warner, because he was a master of a vessel, was not a seaman within the meaning of Section 33 of the Merchant Marine Act, and that consequently section 33 of said act gave no rights to his personal representative to

sue for his wrongful death. Section 713 of the Code reads, in part, as follows:

> "In the construction of this chapter, every person having the command of any vessel belonging to any citizen of the United States shall be deemed to be the 'master' thereof; and every person (apprentices excepted) who shall be employed or engaged to serve in any capacity on board the same shall be deemed and taken to be a 'seaman'; and the term 'vessel' shall be understood to comprehend every description of vessel navigating on any sea or channel, lake or river, to which the provisions of this chapter may be applicable, and the term 'owner' shall be taken and understood to comprehend all the several persons, if more than one, to whom the vessel shall belong."

The Circuit Court agreed with this contention, and sustained the demurrer (R. 7).

Thereafter your petitioner refused to plead further, allowed judgment to be entered against her upon said demurrer, and duly appealed to the Supreme Court of Missouri (R. 1-2).

The latter Court affirmed the judgment of the Circuit Court (R. 11). In the course of its opinion (R. 11) the Court said that the word "seaman" in Section 33 of the Merchant Marine Act must be construed in the light of the definitions contained in Section 713 of the Code. In regard to such definitions, the Court stated:

"We believe that the term 'master' is used as separately and distinctly from the term 'seaman' as if the act read: 'Every person having the command of any vessel * * * shall be deemed to be the 'master' and every other person (apprentices excepted) who shall be employed or engaged to serve in any capacity on board the same shall be deemed and taken to be a 'seaman'" (R. 15).

"We, therefore, believe that Congress clearly intended to distinguish 'master' from 'seaman' and that the word 'seaman' does not include the word 'master' so as to give the master a cause of action under Section 688 of this chapter" (Section 33 of the Merchant Marine Act) (R. 16).

Petitioner contends that the decision of the Supreme Court of Missouri is clearly erroneous.

IV.

SPECIFICATION OF ERROR.

The Supreme Court of Missouri erred in holding that a master of a vessel is not a seaman within the meaning of Section 33 of the Merchant Marine Act of June 5, 1920 (46 U. S. C. A. 688), and that, therefore, said section grants no cause of action for the wrongful death of such master to his personal representative.

V.

SUMMARY OF ARGUMENT.

The only question involved in this case is whether the personal representative of a deceased master of a vessel, who is killed as the result of the negligence of his employer, is granted a cause of action for damages for the death of such master by Section 33 of the Merchant Marine Act of June 5, 1920 (Sec. 688, U. S. C., Title 46). This section provides that the personal representative of a deceased "seaman," who is thus killed, may maintain an action at law for damages under the statutes of the United States conferring our regulating the right of action for death in the case of railway employes. The determination of this question depends upon the construction to be given to two acts of Congress, viz.: (a) Section 33 of the Merchant Marine Act, and (b) Sec. 713, U. S. C., Title 46. These acts are considered separately.

A.

Section 33 of the Merchant Marine Act.

In order to establish that a master of a vessel is a seaman within the meaning of section 33, and that said section gives to the personal representative of a deceased master a cause of action for his death, we desire to call attention to (1) the provisions of the maritime law existing prior to its enactment; (2) its history and purpose;

(3) the rules sanctioned by this Court for construing it, and (4) the meaning of the word "seaman" used therein.

(1) **The provisions of the maritime law existing prior to the enactment of Section 33 of the Merchant Marine Act.**

Prior to the enactment of section 33, the general maritime law granted no cause of action for damages for the death of a seaman and granted inadequate remedies for negligent injury to such persons.

(2) **History and purpose of Section 33 of the Merchant Marine Act.**

In order to promote the welfare of American seamen Congress, in 1915, passed the La Follette's Seamen's Act, which abolished the fellow-servant rule. The hopes of the sponsors of that act apparently were disappointed by the decision in Chelentis v. Luckenbach Steamship Co., in which this Court held that said act did not provide maritime employes with the same measure of protection as land employes.

After the great war, during which thousands of ships were built in the United States, Congress decided to make this country into a first-class sea power. It realized, however, that to do so it had to attract men to the hazardous employment of working on such vessels. For this reason it passed Section 33 of the Merchant Marine Act.

The courts which had been called upon to apply this act

have stated its purposes to be: To change the prior maritime law by giving maritime employes, who have always been considered as wards of admiralty and as a favored class, broadened remedies for personal injury, and by giving their personal representatives a right to recover damages for their death; to substitute for the unjust fellow-servant rule the principle of respondeat superior in suits brought to enforce these rights; to give relief and protection to such men and those dependent upon their earnings; to promote their health, safety and welfare; to cause compensation for their injury or death to be treated as part of the cost of the business; to stimulate their employers to greater diligence for their safety, and to establish uniform, paramount and exclusive federal laws regarding maritime torts.

(3) **The rules sanctioned by this Court for construing Section 33 of the Merchant Marine Act.**

This Court has stated that section 33 should be liberally construed to carry out its beneficent purposes; that refinements of construction, which a different spirit might approve, should be disregarded, and that an adherence to the letter, which would defeat the obvious purposes of Congress and lessen the scope plainly intended to be given to the measure is not required.

Moreover, this Court has pointed out that the word "seaman" used in said section is flexible; has indicated that it can be read to include all of the meanings given

to it by the courts, and has said that, in determining whether or not a person is a seaman, the question to be decided is not whether such person was thought of for purposes of inclusion, but whether he was intentionally excluded.

(4) The meaning of the word "seaman" used in Section 33 of the Merchant Marine Act.

Section 33 of the Merchant Marine Act amends Section 20 of the La Follette Act. Neither of these acts refer to any other law of Congress—not even to Section 713, U. S. C., Title 46. Neither of them define the word "seaman." Consequently resort must be had to general authorities to determine the meaning of that word.

Numerous cases hold that a master of a vessel is a seaman. They point out that it is a matter of common knowledge that a man must be a seaman before he can be a master.

In accord with such cases are those which define the word "seaman" broadly enough to include a master. They state that that word includes all who are employed in the vessel to assist in the main purpose of the voyage; all who sign the ship's articles and are a part of the ship's company; all who practice or are employed in navigation, and as all who follow the sea as a profession or for a livelihood. Such cases also point out that the meaning of the word "seaman" has been enlarged to keep pace with changed conditions in navigation, and that a great many persons who

originally were not considered to be seamen are now deemed to be such.

Considering the purpose and policy of Section 33 of the Merchant Marine Act, these authorities are amply sufficient to justify this Court in holding that a master is a seaman within the meaning thereof.

The Supreme Court of Missouri did not agree with these conclusions. It held that section 33 must be construed in the light of the definitions contained in Section 713, U. S. C. A., Title 46, and that such definitions establish that a master is not a seaman. Such a decision is erroneous.

B.

Section 713, Title 46, U. S. C. A.

Section 713 reads in part as follows:

> "In the construction of this chapter, every person having the command of any vessel belonging to any citizen of the United States shall be deemed to be the 'master' thereof; and every person (apprentices excepted) who shall be employed or engaged to serve in any capacity on board the same shall be deemed and taken to be a 'seaman'; * * *."

Construing this section, the Missouri Supreme Court said that as a master was defined in the first clause, he was impliedly excluded from the definition in the second clause.

In our opinion, the Missouri Supreme Court had no power or authority to use section 713, as contained in the Code,

for the purpose of interpreting section 33. Section 713, as there written, is inconsistent with Section 65 of the Act of June 7, 1872, from which it is derived and upon which it is based. We must look, therefore, only to section 65, which has never been repealed and which by its terms does not and cannot apply to Section 33 of the Merchant Marine Act of June 5, 1920.

But even if Section 713 of the Code must be used to interpret the language of section 33, we still do not believe that it (section 713) conclusively establishes that a master is not a seaman. Section 713 merely provides that, for the purpose of Chapter 18, U. S. C., Title 46, the word "seaman" shall include persons who might otherwise be deemed not to be seamen. It is directed to extension, not to restriction. To hold that a master is impliedly excluded from the definition of "seaman" in the second clause of section 713, because he is included in the first clause, is to impute to Congress the intent to separate a master from all other maritime employes, to put him in a different class, and to deny him alone the remedies of section 33. Such a classification is absurd, arbitrary, unreasonable, and discriminatory. Moreover, to so hold is to change the definition in the second clause to read: "And every person (**masters** and apprentices excepted) * * * shall be deemed to be a 'seaman.'" Congress did not so define the word "seaman." Unlike the British Parliament, which in the Merchant Shipping Acts of 1854 and 1894 specifically excepted a master from the definition of the word "seaman," Con-

gress excepted only apprentices. To thus change the definition in our law to accord with the British definition violates the rule that exceptions in statutes are to be strictly construed, and violates the rule that an express exception excludes all others.

For these reasons we contend that a master of a vessel is a seaman within the meaning of section 33, and that said section grants to the personal representative of a deceased master a cause of action for damages for his death. Consequently the judgment of the Missouri Supreme Court should be reversed and remanded.

VI.

ARGUMENT.

As stated above, the sole question involved in this proceeding is:

> Whether the personal representative of a deceased **master** of a vessel owned by a citizen of the United States, who is killed as the result of the negligence of his employer, is granted a cause of action for damages for the death of such **master** by Section 33 of the Merchant Marine Act of June 5, 1920 (Sec. 688, U. S. C., Title 46), which provides that the personal representative of a **seaman**, who is thus killed, may maintain an action at law for damages under the statutes of the United States conferring or regulating the right of action for death in the case of railway employes?

The determination of this question depends upon the construction to be given to the following acts of Congress: (A) Section 33 of the Merchant Marine Act of June 5, 1920 (Sec. 688, U. S. C., Title 46), and (B) Sec. 713, U. S. C., Title 46. These acts will be considered separately.

A.

Section 33 of the Merchant Marine Act of June 5, 1920.

In order to establish that the master of a vessel is a seaman within the meaning of section 33, and that said section gives to the personal representative of a deceased

master a cause of action for his death, we desire to call attention to (1) the provisions of the maritime law existing prior to its enactment; (2) its history and purpose; (3) the rules sanctioned by this Court for construing it, and (4) the meaning of the word "seaman" used therein.

(1) The provisions of the maritime law existing prior to the enactment of Section 33 of the Merchant Marine Act.

In two recent cases arising under section 33, this Court has described the remedies for the injury or death of a seaman granted by the general maritime law.

In speaking of the remedy for negligent injury, Mr. Justice Cardozo, in Cortes v. Baltimore Insular Line, Inc., 287 U. S. 367, 370, 371, said:

> "By the general maritime law a seaman is without a remedy against the ship or her owners for injuries in his person, suffered in the line of service, with two exceptions only. A remedy is his if the injury has been suffered as a consequence of the unseaworthiness of the ship or a defect in her equipment. * * * A remedy is his also if the injury has been suffered through breach of the duty to provide him with 'maintenance and cure.'"

And in referring to the remedy for wrongful death Mr. Justice Sanford, in Lindgren v. U. S., 281 U. S. 38, 43, 44, said:

> "Prior to the adoption of the Merchant Marine Act

> the general maritime law of the United States did not authorize any recovery of damages or indemnity for the death of a seaman, whether the injury was caused by the negligence of the owner or other members of the crew or the unseaworthiness of the vessel. * * * In this situation it was held, in the absence of any legislation by Congress, that where a seaman's death resulted from a maritime tort on navigable waters within a state whose statutes gave a right of action on account of death by wrongful act, the admiralty courts could entertain a libel in personam for the damages sustained by those to whom such right was given. * * * But, as said by the Circuit Court of Appeals, such statutes 'were not a part of the general maritime law,' and were recognized only because Congress had not legislated on the subject."

(2) **History and purpose of Section 33 of the Merchant Marine Act.**

The first attempt to broaden the remedies provided by the general maritime law took place in 1915. On March 4th of that year Congress passed the La Follette Seaman's Act, the declared purpose of which was to "promote the welfare of American seamen" (Panama Railway Co. v. Johnson, 264 U. S. 375, 389). Section 20 of that act (C. 153, 38 Stat. 1164, 1185; Comp. Stat. 1916, Secs. 8306, 8337a; U. S. C. A., Title 46, Sec. 688, note) provides:

> "In any suit to recover damages for any injury sustained on board vessel or in its service, seamen having

command shall not be held to be fellow-servants with those under their authority."

This act was construed in Chelentis v. Luckenbach Steamship Co., 247 U. S. 372, 384, 385, in which this Court said:

> "The language of the section discloses no intention to impose upon ship owners the same measure of liability for injuries suffered by the crew while at sea as the common law prescribes for employers in respect of their employes on shore."

In 1919 Congress was concerned with the disposition to be made of the numerous ships built during the Great War. (See 46 U. S. C. A. 861 et seq.). Many bills in regard to this subject were introduced in the Senate, and by it referred to the committee on commerce. Said committee, after protracted hearings, came to the conclusion that with these ships the United States could, and should, become a first-class sea power. (See Report No. 573, Senate Committee on Commerce, 66th Congress, 2nd Session.) At hearings during February, 1920, Mr. Andrew Furuseth, the president of the International Seamen's Union of North America, appeared before the committee, convinced it that the United States could not successfully establish and maintain an adequate merchant marine without passing suitable laws to protect the men engaged in the operation thereof, called attention to the decision in the Chelentis case, supra, and, in order to give maritime employes the same rights as land employes, suggested the language of Section 33 of the Mer-

chant Marine Act in substantially the same words as used in the final enactment thereof. (See U. S. Senate Hearings on Establishment of a Merchant Marine, pp. 1628, 1709 and 1712.) As a result of these hearings Section 33 was embodied in the Merchant Marine Act as an amendment to Section 20 of the LaFollette Act (Panama Railroad Co. v. Johnson, 264 U. S. 375, 389). The purpose and policy of the Merchant Marine Act is to "do whatever may be necessary to develop and encourage the maintenance of * * * a merchant marine" (46 U. S. C. A., Sec. 861, and note thereunder, c. 250, S. 1, 41 Stat. 988, and Panama Ry. Co. v. Johnson, supra).

The purpose of Congress in passing Section 33 of the Merchant Marine Act is indicated also by the remarks of the courts which have been called upon to apply it. Thus, in Lindgren v. U. S., 281 U. S. 38, 44, Mr. Justice Sanford, after commenting upon the absence of a remedy for death in the general maritime law, said:

> "By the Merchant Marine Act, however, the prior maritime law was modified by giving to personal representatives of seamen whose death had resulted from personal injuries, the right to maintain an action for damages in accordance with the provisions of the Federal Employers' Liability Act."

Similarly, in Cortes v. Baltimore Insular Line, Inc., 287 U. S. 367, 371, 372, Mr. Justice Cardozo, after discussing

the limited remedies for negligent injury given by the general maritime law, said:

> "The question then is to what extent the ancient rule has been changed by modern statutes. Section 33 of the Merchant Marine Act of (June 5) 1920, commonly known as the Jones Act (41 Stat. at L. 1007, chap. 250, S. 33, U. S. C. Title 46, S. 688), gives a cause of action to the seaman who has suffered personal injury through the negligence of his employer. For death resulting from such injury it gives a cause of action to his personal representative."

Again, in Kuhlman v. W. A. & Fletcher Co., 20 Fed. (2d) 465, 467, the Circuit Court of Appeals for the Third Circuit said:

> "This section broadened the maritime law by giving a seaman a new right—a right at law—through proceedings in personam, according to the course of the common law, on the common-law side of federal district courts. State courts also have like jurisdiction (Engel v. Davenport, 271 U. S. 33, 46 S. Ct. 410, 70 L. Ed. 813). By so doing the Congress did not abrogate his old action in admiralty, but gave him an entirely new action and allowed him a clear option to assert his old action in admiralty on the admiralty side of the district court with trial to the Court or to assert his new action, based on negligence, on the law side with right of trial by jury (Panama R. R. Co. v. Johnson, 264 U. S. 375, 44 S. Ct. 391, 68 L. Ed. 748; Engel v. Davenport, 271 U. S. 33, 36, 46 S. Ct. 410, 70 L. Ed. 813)."

Furthermore, in International Stevedoring Co. v. Haverty, 272 U. S. 50, 52, Mr. Justice Holmes, in regard to section 33, said:

> "The policy of the statute is directed to the safety of the men and to treating compensation for injuries to them as properly part of the cost of the business."

See, also, Bainbridge v. Merchants & Miners Transportation Co., 287 U. S. 278, in which it was held that section 33 is a law made for the health and safety of seamen within the provisions of Chap. 113, 40 Stat. at L. 683, U. S. C., Title 28, Sec. 837, and Foster v. U. S., 46 Fed. (2d) 359, 360, in which the Court pointed out that section 33 was passed to encourage those who desired to engage in maritime service.

The following cases, which deal primarily with the effect of section 33, are also of assistance in determining the intent of Congress in passing it:

In Lindgren v. U. S., 281 U. S. 38, the Court said:

> "* * * the Merchant Marine Act * * * establishes * * * a rule of general application in reference to the liability of owners of vessels for injuries to seamen * * * (p. 46).
>
> "* * * it covers the entire field of liability for injuries to seamen, it is paramount and exclusive, and supersedes the operation of all state statutes dealing with that subject" (p. 47).

And in Uravic v. F. Jarka Co., Inc., 282 U. S. 234, 240, 241, this Court pointed out that the Merchant Marine Act abolished the fellow-servant rule as to maritime torts, and stated:

> "At the argument it was suggested that the case should be governed by the general maritime law. This means, as we have indicated, by the law of the United States, with the provisions of Sec. 33 left out. It is assumed that by the law so qualified a master would not be liable to a servant for an injury caused by the negligence of a fellow servant. But that doctrine is of relatively recent appearance in admiralty following the common law (The City of Alexandria [D. C.], 17 Fed. 390). And, as we believe, it was introduced into the common law almost within the memory of men still living upon a principle of policy (Labatt, Mast. & S., Secs. 471 et seq., Sec. 484; 2d ed., Secs. 1394, 1408). It would be somewhat hard to maintain that principle as still the policy of the law in this case after the doctrine has been abolished for railroad employes and seamen. (See International Stevedoring Co. v. Haverty, 272 U. S. 50, 52, 71 L. ed. 157, 159, 47 S. Ct. 19.)"

See, also, Jamison v. Encarnacion, 281 U. S. 635, 639, 640, in which Mr. Justice Butler, in regard to the Federal Employers' Liability Act, which by reference is made a part of Section 33 of the Merchant Marine Act, said that the measure was adopted for the relief of a large class of persons employed in a hazardous work; that it completely abrogates the fellow-servant rule and applies the

principle of respondeat superior; and that it is intended to stimulate employers to greater diligence for the safety of their employes.

So much for the history, purposes and effect of section 33. How should it be construed? The courts have answered this question in numerous decisions.

(3) **The rules sanctioned by this Court for construing Section 33 of the Merchant Marine Act.**

In Cortes v. Baltimore Insular Line, 287 U. S. 367, 375, Mr. Justice Cardozo used the following language:

> "This Court has held that the act is to be liberally construed in aid of its beneficent purpose to give protection to the seaman and to those dependent upon his earnings (Jamison v. Encarnacion, 281 U. S. 635 * * *). Approaching the decision of this case in a like spirit of liberality, we put aside many of the refinements of construction that a different spirit might approve."

Again, in Bainbridge v. Merchants & Miners Transportation Co., 287 U. S. 278, 282, Mr. Justice Sutherland said:

> "Seamen have always been regarded as wards of admiralty * * *. The policy of Congress, as evidenced by its legislation, has been to deal with them as a favored class * * *. In light of and to effectuate that policy statutes enacted for their benefit should be liberally construed."

In addition, in Cortes v. Baltimore Insular Line, Inc., 287 U. S. 367, 377, the Court said:

> "This Court has said that 'the ancient characterization of seamen as wards of admiralty is even more accurate now than it was formerly' (Robertson v. Baldwin, 165 U. S. 275, 287)."

Furthermore, in Jamison v. Encarnacion, 281 U. S. 635, 640, the following statement occurs:

> "The rule that statutes in derogation of the common law are to be strictly construed does not require such an adherence to the letter as would defeat an obvious legislative purpose or lessen the scope plainly intended to be given to the measure * * *. The act is not to be narrowed by refined reasoning or for the sake of giving 'negligence' a technically restricted meaning. It is to be construed liberally to fulfill the purposes for which it was enacted and to that end the word may be read to include all the meanings given to it by courts and within the word as ordinarily used."

Incidentally, it should be noted that these remarks are as pertinent to the construction of the word "seaman" in section 33 as to the word "negligence."

From the above quotations it is apparent that section 33 as a whole should be liberally construed for the benefit of all maritime employes. The following cases establish that the word "seaman" used therein should also be construed with the same spirit:

International Stevedoring Co. v. Haverty, 272 U. S. 50, 52. The question here involved was whether a stevedore was a "seaman" within the meaning of section 33. In answering this question in the affirmative, and in overruling the older cases which held to the contrary, Mr. Justice Holmes said:

> "It is true that for most purposes, as the word is commonly used, stevedores are not 'seamen.' **But words are flexible.** The work upon which the plaintiff was engaged was a maritime service * * *. In view of the broad field in which Congress has disapproved and changed the (fellow-servant) rule introduced into the common law within less than a century, we are of opinion that a **wider scope should be given to the words of the act**, and that in this statute 'seaman' is to be taken to include stevedores employed in maritime work on navigable water, as the plaintiff was, whatever it might make in laws of a different kind." (Matter in parenthesis supplied.)

Before leaving this case we wish to point out that even though it might be said that some of the old definitions of the word "seaman" exclude the master of a vessel, this case provides direct authority for considering the word "seaman" in section 33 as flexible, and as sufficiently broad and general to include a master. Unless it is so considered, masters will be denied all of the remedial rights and privileges granted by section 33, will be left to the inadequate maritime law, and will find themselves confronted with the fellow-servant rule which Congress has discarded for

nearly all other employes over whom it has jurisdiction to legislate.

Uravic v. F. Jarka Company, Inc., 282 U. S. 234, 239, 240, also bears out these contentions. The issue there before the Court was whether or not section 33 applied to an American citizen who, as a stevedore, was helping unload a ship flying the German flag in the harbor of New York. It is true that this issue is different from that involved in the case at bar. However, the following language of the Court has a direct bearing upon the question of whether the word "seaman" in section 33 should be construed as broad enough to include a master:

> "But the question is not whether they were thought of for the purpose of inclusion, but whether they were intentionally excluded from a description that on its face includes them * * *. Here we are dealing with the conduct of persons within the jurisdiction (of the United States) affecting the safety of other persons within it. If the rule (of section 33) is wise, there is no reason why it should not be universal. Wise or not, it is law, and the question is why general words should not be generally applied." (Matter in parenthesis supplied.)

The following quotation is also pertinent:

> "For the sure and true interpretation of all statutes in general (be they penal or beneficial, restrictive or enlarging of the common law) four things are to be discussed and considered: (1) What was the common

law before the making of the act? (2) What was the mischief and defect for which the common law did not provide? (3) What remedy the parliament hath resolved and appointed to cure the disease of the commonwealth (4) The true reason of the remedy. And then the office of all the judges is always to make such construction as shall suppress the mischief and advance the remedy, and to suppress subtle inventions and evasions for the continuance of the mischief" (Heydon's Case, 3 Co. 7, 1 Bl. Com. 61, 87). (See, also, Cooley's Blackstone, 4th Ed., Vol. I, p. 88.)

To sum up: The maritime law existing prior to the passage of the LaFollette and the Merchant Marine Acts provided no remedy for the death of a maritime employe, and provided only inadequate remedies for negligent injuries to such persons. In order to cure this mischief and to promote the welfare of American seamen Congress in 1915 passed the LaFollette Act. The hopes of the sponsors of that act apparently were disappointed by the decision in Chelentis v. Luckenbach Steamship Co., supra, in which this Court held that it did not provide maritime employes with the same measure of protection as land employes. After the Great War, during which thousands of ships were built in the United States, Congress decided to make this country a first-class sea power. It realized, however, that to do so it had to attract men to the hazardous employment of working upon such vessels. For this reason it passed Section 33 of the Merchant Marine Act in June, 1920. Construing this act, the courts have stated its pur-

poses to be: to change the prior maritime law by giving seamen, who have always been considered as wards of admiralty and as a favored class, broadened remedies for personal injury, and by giving their representatives a right to recover damages for their death; to substitute for the unjust fellow-servant rule the principle of respondeat superior in suits brought to enforce these rights; to give relief and protection to such men, and those dependent upon their earnings; to promote their health, safety and welfare; to cause compensation for their injury or death to be treated as part of the cost of the business; to stimulate their employers to greater diligence for their safety, and to establish uniform, paramount and exclusive federal laws regarding maritime torts. These being the beneficent purposes of this act, general words used therein, such as "seaman," should be liberally and broadly interpreted so as to extend the remedies therein provided to all maritime employes, whether they be master, junior officer or common seaman. Such words are flexible and are to be generally applied. In determining whether a master is a seaman within the meaning of the act, the question is not whether he was thought of for the purpose of inclusion, but whether he was intentionally excluded. And in passing upon this question the office of this Court is to suppress the mischief of the old maritime law, and to advance the remedies of the Merchant Marine Act—to suppress subtle inventions and evasions for the continuance of the mischief.

With these general principles in mind, let us consider the precise question here involved.

(4) The meaning of the word "seaman" used in Section 33 of the Merchant Marine Act.

Section 33 of the Merchant Marine Act (U. S. C., Title 46, Sec. 688, reads as follows:

> "Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employes shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employes shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located."

This act amends Section 20 of the LaFollette Act. As neither of these acts refers to any other law of Congress—not even to Sec. 713, U. S. C., Title 46—and as neither of them defines the word "seaman," resort must be had to authorities of general application to determine the meaning of that word.

Such authorities consider a master to be a seaman. Thus, in the Burns Bros., No. 31, 29 Fed. (2d) 855, a suit in admiralty for personal injuries, the Court held that a master is a seaman within the meaning of 28 U. S. C. A. 837 (C. 27, s. 1, 40 Stat. 157, c. 113, s. 1, 40 Stat. 683), which gives to seamen the right to sue in federal courts to enforce laws made for their health and safety, without prepayment of costs. A similar holding was made In re Scott, 250 Fed. 647, 648, which involved the right of a master to become a naturalized citizen of the United States under Revised Statutes, Sec. 2174 (Comp. Stat. 1916, s. 4357). By its terms said act applied only to seamen. In the course of the opinion the Court said:

> " 'Seaman' is defined by Webster as:
>
> > " 'One whose occupation is to assist in the management of ships at sea; a mariner * * *; applied both to officers and common mariners.'
>
> "It is common knowledge that a man must be a seaman before he can be a master. It is manifest that the word 'seaman' might be used in different enactments in different senses, and the intended sense might appear from the context. If there is nothing in the context to show the sense in which the word is used, then it seems to me that it should be given the broadest meaning, so as to include a master, as well as a common seaman before the mast.
>
> "Certainly an enabling act, such as this, should not receive such a narrow construction as to deprive one who comes within its terms of any rights thereby

given, merely because he happened to be a high-class man instead of a low-class one. The fact that a man has made the most of his opportunities, and has risen to the head of his profession, should not bar him from receiving the benefits conferred on his profession."

* * * * * * *

"I have found no case in which the identical question now raised has been considered, but there are certain cases that are very persuasive by analogy as to the construction to be given this act. Judge Story, in United States v. Winn, 28 Fed. Cas. No. 16,740, where the question was the construction of Act Cong. March 3, 1835, c. 40, Sec. 3, 4 Stat. 776, providing that, 'if any master or other officer, etc., shall from malice, hatred, or revenge, and without justifiable cause, beat, wound or imprison any one or more of the crew,' etc., he shall be punished by fine, etc., in construing that statute, says:

" 'Now I do not think anything material in the construction of this statute can turn upon the rule, so ably and strenuously expounded at the bar, that penal statutes are to be construed strictly. I agree to that rule in its true and sober sense; and that is that penal statutes are not to be enlarged by implication, or extended to cases not obviously within their words and purport. BUT WHERE THE WORDS ARE GENERAL, AND INCLUDE SEVERAL CLASSES OF PERSONS, I KNOW OF NO AUTHORITY WHICH WOULD JUSTIFY THE COURT IN RESTRICTING THEM TO ONE CLASS, OR IN GIVING THEM THE NARROWEST INTERPRETATION, WHERE THE MISCHIEF TO BE REDRESSED BY THE STATUTE IS EQUALLY APPLICABLE TO ALL OF

> THEM. And where a word is used in a statute, which has various known significations, I know of no rule that requires the court to adopt one in preference to another, simply because it is more restrained, if the objects of the statute equally apply to the largest and broadest sense of the word. In short, it appears to me that the proper course in all these cases is to search out and follow the true intent of the Legislature, and to adopt that sense of the words which harmonizes best with the context, and promotes in the fullest manner the apparent policy and objects of the Legislature.' "

To the same effect is The Balsa, 10 Fed. (2) 408. Here a master libeled a vessel, charging her owners with negligence in failing to keep her in seaworthy condition and praying damages for his injury and the payment of his expense for cure and maintenance. The question involved was whether the rule which gives a seaman the right to recover his costs of cure and maintenance extended to the master. The Court answered the question in the affirmative, stating:

> "It would seem, ratione rei, there is no difference (except in degree) between the position of a master and that of a common seaman when it comes to an injury of one or the other as affecting the movement of the ship and her preservation to her owners; and no difference in the duty which in humanity (and self-interest) the owners owe one or the other. Though in different stations, each is a mariner, running the same risks, encountering the same dangers, engaged in the

> common adventure of sailing and safe-guarding the ship and her cargo. In this view, 'master, mates, sailors, surveyors, carpenters are mariners' (Benedict's Admiralty [4th Ed.] 189)."

See, also, 56 C. J., p. 922, in which it is said:

> "Broadly speaking, the term 'seaman' includes a ship's officer, as well as her men."

Moreover, that a master is considered to be a seaman within Section 33 of the Merchant Marine Act is also indicated by certain decisions which consider that act in connection with the Longshoremen's and Harbor Worker's Compensation Act of March 4, 1927 (C. 509, 44 Stat. 1424, 33 U. S. C. A. Supp., ss. 901-950). That latter act provides for compensation when longshoremen or harbor workers are injured or killed upon navigable waters and specifically states that no compensation shall be payable in respect of the disability or death of a master or member of the crew of any vessel (see 33 U. S. C. A. 903 [1], c. 509, s. 3, 44 Stat. 1426). The master and members of the crew were thus excepted because they were satisfied with the provisions of the Merchant Marine Act, and through their organized representative made known to Congress that they wished to remain outside of the latter act (Nogueira v. N. Y. N. H. & H. R. Co., 32 Fed. [2d] 179, 181). In speaking of the fact that they were so excepted, this Court in Nogueira v. N. Y. N. H. & H. R. Co., 281 U. S. 128, 134, 135, 136, said:

"**As to the master and crew** of a vessel, it should be noted that Section 33 of the Merchant Marine Act (June 5), 1920 (Chap. 250, 41 Stat., at L. 988, 1007, U. S. C., Title 46, sec. 688), gave to **seamen** the rights and remedies under all statutes of the United States which were applicable to railway employes * * * thus carrying to seamen the benefit of the provisions of the Federal Employers' Liability Act.

"It appears that the bill (Longshoremen's and Harborworker's Compensation Act) originally excluded **a master or member of a crew of a vessel**, but was amended so as to extend to them the benefit of compensation * * *. AS THESE SEAMEN preferred to remain outside of the provisions of the bill, they were finally excluded and the bill was passed with the exceptions above quoted." (Matter in parenthesis supplied.)

If a master is not a seaman within the meaning of the Merchant Marine Act, then it is apparent that this Court was guilty of using very loose language in the Nogueira case, supra.

In this connection see also In re Eastern Transport Co., 37 Fed. (2d) 355, where the Court apparently allowed the personal representative of a deceased master to recover under section 33. Similarly, in the petition of The Clyde Steamship Co., 16 Fed. (2d) 930, affirmed 18 Fed. (2d) 1015, and certiorari denied, 275 U. S. 529, the administratrix of one holding a master's license was allowed to recover. And in The Petition of Crosby Fisheries, Inc.,

31 Fed. (2d) 1004, the Court said that section 33 was broad enough to include officers, and allowed recovery by a mate who was acting as master.

In accord with these authorities are the following, which, although dealing primarily with the word "seaman," define it broadly enough to include a master:

The Z—R. 3, 18 Fed. (2d) 122, 123: "Changing conditions and necessities for changes, extended the term to include all persons employed in a vessel to assist in the main purpose of the voyage."

U. S. v. Atlantic Transport Co., 188 Fed. 42, 43: "* * * all * * * who sign a ship's articles for a voyage or succession of voyages, being part of the ship's company, may be considered as seamen * * *."

U. S. v. Nelson, 100 Fed. 125, 126: "The term 'seamen' * * * clearly means those Americans who practice or are employed in navigation—whose avocation is that of mariner."

Webster's New International Dictionary, "Seaman": "One whose occupation is to assist in the management of ships at sea; a mariner; * * *; applied both to officers and especially to common sailors. Opposed to landsman. Specif: (a) In the **English Merchant Shipping Act**, s. 742 (1894), any person (**except masters**, pilots, and apprentices duly indentured and registered) employed or engaged in any capacity on board any ship; (b) in the **United States**

Revised Statutes (Sec. 4612), any person **(apprentices excepted)** employed or engaged to serve in any capacity on board a vessel."

Zell's Cyclopedia Dictionary: "One who follows the sea as a profession or for a livelihood; one skilled in navigation or seamanship."

See, also, The Buena Ventura, 243 Fed. 797, 799, 800: "* * *—everyone is entitled to the privilege of a seaman who, like seamen, at all contribute to and labor about the operation and welfare of the ship when she is upon a voyage * * *. * * * a man who serves the ship as the result of a contractual engagement of any kind, and serves her in navigation * * *."

As to the changing meaning of the word "seaman," see further The Sea Lark, 14 Fed. (2d) 201; Hoof v. Pacific-American Fisheries, 284 Fed. 174, 176, affirmed 291 Fed. 306; Cassil v. U. S. E. F. Corp., 289 Fed. 774, 776, and The Herdis, 22 Fed. (2d) 304, 305.

Originally, in the days of sailing vessels, the word "seaman" meant one who could "hand, reef and steer," but the courts in attempting to keep up with changed conditions in navigation have given it an enlarged meaning (Meyer v. Dollar Steamship Line, 43 Fed. [2d] 425, 426; The Buena Ventura, 243 Fed. 797, 799; The Sea Lark, 14 Fed. [2d] 201). Consequently the following persons have been held to be seamen: The owner of an orchestra (The Sea Lark, supra); a cook (Allen v. Hallett, 1 Fed. Cas.

No. 223, pp. 472, 473); a fireman (The North American, 18 Fed. Cas., p. 339); an employe of a dredge (Saylor v. Taylor, 77 Fed. 476); a wireless operator (The Buena Ventura, supra); a carpenter (Kuhlman v. W. & A. Fletcher Co., 20 Fed. [2d] 465; Rogosich v. Union Dry Dock & Repair Co., 67 Fed. [2d] 377); a horseman (U. S. v. Atlantic Transport Co., 188 Fed. 42, 43); a diver (DeGaetano v. Merritt & Chapman D. & W. Co., 203 App. Div. 259, 196 N. Y. S. 573); an engineer of a dredging barge (City of Los Angeles v. United Dredging Co., 14 Fed. [2d] 365); a watchman (Grimberg v. Admiral Oriental Steamship Line, 300 Fed. 619); a pilot (The Mary Elizabeth, 24 Fed. 397); a cooper (U. S. v. Thompson, 28 Fed. Cas. 102); a hand on a river boat (Martin v. Acker, 16 Fed. Cas., p. 884); and a surgeon, porter, and chamber maid (see Meyer v. Dollar Steamship Line, supra).

Surely if all of the above persons are to be classed as seamen and allowed to recover under the Merchant Marine Act, a master should also. He is employed to serve on board a vessel and to assist in the main purpose of the voyage. He contributes to the welfare of the ship and serves her in navigation. He runs the same risks, encounters the same dangers, and is engaged in the common adventure of sailing and safeguarding his employer's vessel and its cargo. The only difference between him and the persons mentioned above, is that his work is more important than theirs, and his presence on board the vessel more necessary.

Remembering, therefore, that Section 33 of the Merchant

Marine Act is remedial legislation which must be liberally construed, and that the words used therein have a flexible meaning, it seems clear to us that the word "seaman" used in said section is broad enough to include a master of a vessel. That word is a general one, which includes several classes of persons, and no authority justifies restricting it to one class, or in giving it the narrowest possible interpretation. The mischief to be redressed by the statute is equally applicable to all classes.

The Supreme Court of Missouri, however, did not agree with these conclusions. In its opinion (R. 13) it said that Section 33 of the Merchant Marine Act must be construed in the light of the definitions given in Section 713, U. S. C., Title 46; and that the latter section establishes that a master of a vessel is not a seaman. We believe such a statement to be erroneous.

B.

Section 713, U. S. C., Title 46.

Section 713, U. S. C., Title 46, reads as follows:

> "In the construction of this chapter, every person having the command of any vessel belonging to any citizen of the United States shall be deemed to be the 'master' thereof; and every person (apprentices excepted) who shall be employed or engaged to serve in any capacity on board the same shall be deemed and taken to be a 'seaman'; and the term 'vessel' shall be understood to comprehend every description of vessel

navigating on any sea or channel, lake or river, to which the provisions of this chapter may be applicable, and the term 'owner' shall be taken and understood to comprehend all the several persons, if more than one, to whom the vessel shall belong."

Construing said section the Missouri Supreme Court in its opinion said:

"We believe that the term 'master' is used as separately and distinctly from the term 'seaman' as if the act read: 'Every person having the command of any vessel * * * shall be deemed to be the "master" and every other "person (apprentices excepted) who shall be employed or engaged to serve in any capacity on board the same shall be deemed and taken to be a "seaman"' (R. 15).

"We, therefore, believe that Congress clearly intended to distinguish 'master' from 'seaman' and that the word 'seaman' does not include the word 'master' so as to give the master a cause of action under section 688 of this chapter" (Section 33 of the Merchant Marine Act) (R. 16).

In our opinion the Missouri Supreme Court had no power or authority to use Section 713 of the Code in determining the meaning of a word in Section 33 of the Merchant Marine Act. We make this statement in spite of the fact that both sections were placed in chapter 18, title 46, by those who compiled the code, and in spite of the fact that section 713 on its face applies to all other provisions in said chapter. Our reason for so stating is

that section 713, as contained in the code, does not represent any law enacted by Congress. According to the historical note under section 713, said section is derived from, and is based upon, Section 65 of the Act of June 7, 1872 (C. 322, S. 65, 17 Stat. 277). Section 65 reads, in part, as follows:

> "That to avoid doubt **in the construction of this act,** every person having the command of any ship belonging to any citizen of the United States shall, **within the meaning and for the purposes of this act,** be deemed and taken to be the 'master' of such ship; and that every person (apprentices excepted) who shall be employed or engaged to serve in any capacity on board the same, shall be deemed and taken to be a 'seaman' **within the meaning and for the purposes of this act** * * *."

This language is materially different from the language used in Section 713 of the Code. Section 65, which has never been repealed, confines the definition therein contained to the Act of June 7, 1872, and possibly to subsequent amendments of that act. It should be noted, however, that Section 20 of the LaFollette Act does not amend any prior law of the United States (see said act in pamphlet entitled, "Public—No. 302—63d Congress, S. 136," Section 20, page 24), and that Section 33 of the Merchant Marine Act simply amends Section 20 of the LaFollette Act. Therefore, to apply the definitions in Section 65 of the Act of 1872 to the Merchant Marine Act of June 5, 1920, the

purpose and policy of which is entirely different from the act of 1872, is to permit those who compiled the Code, instead of Congress, to enact the laws of the United States. This cannot be done. Thus, as said in 59 C. J., p. 893:

> "* * * a compiler is not a lawmaker, * * * codification is not legislation * * *, and a statute neither gains nor loses force by the place it occupies in the collection of laws. Its sanction * * * depends upon its own terms, and would be the same if it had been printed anywhere else in the Code."

Consequently, as Section 713 of the Code is not itself the enactment of a new law, does not repeal or amend any old law, and is inconsistent with Section 65 of the Act of June 7, 1872, we must give effect to section 65 for all purposes.

> "The matter set forth in the Code, * * * shall establish prima facie the laws of the United States, general and permanent in their nature in force on the 7th day of December, 1925; but nothing in this act shall be construed as repealing or amending any such law, or as enacting as new law any matter contained in the Code. In case of any inconsistency arising through omission or otherwise between the provisions of any section of this Code, and the corresponding portion of legislation heretofore enacted, effect shall be given for all purposes whatsoever to such enactments" (Section 2a, Act of June 30, 1926, Titles 1-4, U. S. C. A., page 4, Chapter 712, 44 Stat. at L., Pt. 1, 1).

For these reasons we say that section 713 cannot be

used to construe the word "seaman" in Section 33 of the Merchant Marine Act; that the express words of Section 65 of the Act of June 7, 1872, prevent it from being used for such purpose; and that under these circumstances the meaning of such word must be determined from the general authorities set forth under part "A" hereof.

But even if we assume, for the sake of argument, that the definitions in Section 713 of the Code must be resorted to, we still do not believe that they conclusively establish that a master is not a seaman. They merely provide that, for the purposes of Ch. 18, Title 46, U. S. C., the word "seaman" shall include persons who might otherwise be deemed not to be seamen. They are directed to extension, not to restriction (Uravic v. F. Jarka Co., Inc., 282 U. S. 234, 239). Moreover, the mere fact that the first clause of said section defines the word "master," does not impliedly exclude a master from the broad, all inclusive definition given to the word "seaman" in the second clause. To hold that he is excluded is to impute to Congress the intent to separate him (the master) from all other maritime employes, whether they be mates, pilots, common seamen, or others merely incidentally assisting in the main purpose of the voyage, and to deny him alone the remedial rights and privileges granted by Section 33 of the Merchant Marine Act. Under no construction of section 713 can it be said that these other officers and lesser employes are not seamen. Such an attitude is absurd, arbitrary, unreasonable, discriminatory and obvi-

ously defeats the purposes of Congress. Moreover, to hold that a master is not included within the second clause of section 713, we must change the statutory definition of the word seaman to read:

> "* * * and every person (**masters and** apprentices excepted) who shall be employed or engaged to serve in any capacity * * * shall be deemed * * * to be a 'seaman.'"

Congress did not so define the word "seaman." Unlike the British Parliament (see reference to English Merchant Shipping Act of 1894 in quotation above from Webster's New International Dictionary), Congress excepted only apprentices. To thus change our definition to accord with the British definition, violates the rule that exceptions in statutes should be strictly construed, and that all doubts should be resolved in favor of the general provision rather than the exception (59 C. J., p. 1092; Piedmont & N. Ry. Co. v. U. S., 30 Fed. [2d] 421, 431); violates the rule that an express exception excludes all others (59 C. J., p. 1092; Bend v. Hoyt, 13 Pet. 262, 271, 272; Hopkins et al. v. U. S., 235 Fed. 95, 98); and violates the rule that where a legislative body has made a specific exception and has made no other exception or limitation, a conclusive presumption arises that it intended to make none (Wabash R. R. Co. v. U. S., 178 Fed. 5, 11).

Before closing we wish to answer certain arguments made by the respondent in his brief in opposition to the granting of the writ of certiorari.

On page 15 et seq. of said brief respondent contends that petitioner is granted no cause of action by Section 33 of the Merchant Marine Act because she has not sufficiently alleged that her husband was engaged in interstate commerce at the time of his death. We believe that her allegations in this regard are sufficient (see R. p. 5). However, such a contention is erroneous because it ignores the fact that Congress' power to legislate upon maritime matters is derived from Article III, Section 2, of the Constitution of the United States, and not from its jurisdiction over interstate commerce. Being so derived, the nature of the commerce in which a seaman is employed at the time of his injury or death is not material. (See London Guaranty Accident Co. v. Industrial Acc. Com., 279 U. S. 109, 124, and U. S. v. Burlington etc. Ferry Co., 21 Fed. 331, 336, 339.)

On page 17 of said brief respondent says that Section 33 of the Merchant Marine Act (Section 688, U. S. C., Title 46) amends Chapter 18 of the Merchant Marine Act. This statement is untrue. The opening provision of section 33 reads as follows:

> "That Section 20 of such Act of March 4, 1915, be, and is, amended to read as follows: * * *"

(See "Public—No. 261—66th Congress, H. R. 10378," page 22, section 33). Chapter 18 of Title 46 of the Code is purely an invention of those who compiled the law.

On page 23 of said brief respondent quotes at length from The Arina, 12 P. & D. 118, 123; Connor v. Flora, 6

Can. Exch. 131, 132, and Corbett v. Pearce, 2 K. B. L. T. Rep. (n. s.) 781, in order to establish that a master is not considered to be a seaman. These cases tend to confuse rather than to clarify the issue, for they all involve British Merchant Shipping Act of 1854, which, unlike Section 713 of our Code, expressly excepts masters from the definition of the word "seaman."

It is true, as stated by respondent on page 23 et seq. of said brief, that there are certain authorities which, for some purposes, state that a master is not a seaman. These authorities are distinguishable, however, upon the ground that they deal with matters which are alien in their nature to the subject matter of Section 33 of the Merchant Marine Act. Moreover, it should be remembered that, although a master may not be a seaman for some purposes, yet he is an agent of the owner of the vessel just as much as the lowliest deck hand (24 R. C. L., "Shipping," Secs. 172 and 174; 36 Cyc, p. 125; The J. P. Donaldson, 167 U. S. 599, 603). He can be discharged at any time, at any place, and for any cause which seems to the owner to be sufficient (Montgomery v. Henry, 1 U. S. [1 Dall.] 49; Childs v. Gladding, Fed. Cas. No. 2678; 24 R. C. L., "Shipping," Sec. 156; 36 Cyc, p. 122; Benedict on Admiralty, 5th Ed., Vol. 1, page 105). His compensation is generally fixed by agreement between him and the owner (24 R. C. L., "Shipping," Sec. 157). He is subject to the control of the owner at all times (Ward v. Ruckman, 96 N. Y. 26, 37). And he must obey the instructions of the owner (24 R. C. L.,

"Shipping," Sec. 168, p. 1131). Under these circumstances he is an employe. (See Roberts Federal Liability of Carriers, 2d Ed., Vol. 2, p. 1380, in which it is said:

> "Under the well-settled principles of the common law, the existence of the relation of master and servant is generally tested by a consideration of four elements: (1) Selection and engagement of the servant; (2) payment of wages; (3) power of dismissal, and (4) the power to control the actions of the servant; and the coincidence in one person of these four elements undoubtedly constitutes such person the * * * employer."

Being an employe, a master of a vessel should be entitled to all the privileges granted to a seaman. There is no difference in the duty which in humanity and self-interest the owner owes one or the other. Though in different stations, each is a mariner, running the same risks, encountering the same dangers, engaged in the common adventure of sailing and safeguarding the ship and her cargo.

On pages 27 and 28 of said brief, respondent seeks to support his contentions by saying that we must keep in mind the general law of master and servant to the effect that a master is not liable to the superior for damages resulting from the negligence of his subordinate. This doctrine is not applicable in the case at bar because, being a refinement of the old fellow-servant rule, it was abolished by Section 33 of the Merchant Marine Act. Furthermore, it is not applicable because the pilot of the Iowa, whose

negligence was responsible for Captain Warner's death (petitioner's husband), was not his subordinate. At the time of the accident the pilot was in complete and exclusive control of the navigation of the vessel. (See 24 R. C. L., "Shipping," Sec. 255; Atlee v. The Northwestern Packet Co., 21 Wall. 389, 396, 397, 22 L. ed. 619, 621; Cooley v. The Board of Wardens, 12 How. 299, 316, 13 L. ed. 996, and Homer-Ramsdell Transportation Co. v. Companie Generale Transatlantique, 63 Fed. 845, 847.) See, also, U. S. v. The Science, Fed. Cas. No. 16,239, in which it was held that a master, who without being licensed performs the duty of a pilot, is subject to a fine.

CONCLUSION.

For all of these reasons we believe that a master of a vessel is a seaman within the meaning which Congress intended to give to Section 33 of the Merchant Marine Act, and that as such he and his personal representatives are entitled to the remedies granted by that act. We submit, therefore, that this case should be reversed and remanded.

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